STATE OF MICHIGAN

IN THE SUPREME COURT

DANIEL KNUE and JACQUELINE KNUE,

Plaintiffs/Cross-Defendants/Appellees,

v

JOAN SMITH, STEVE SMITH, and CORNELIUS CASEY SMITH, a/k/a CASEY SMITH,

Defendants/Cross-Plaintiffs/Appellants.

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Ottawa Circuit Court
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APPLICATION FOR LEAVE TO APPEAL

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STATEMENT CONCERNING COMPLAINED-OF OPINION, JUDGMENT, OR ORDER AND SETTING FORTH REQUESTED RELIEF

Defendants-Appellants Cornelius Smith, Joan Smith, and Steve Smith ("defendants") seek leave to appeal from the December 13, 2005, Court of Appeals published opinion that affirmed the trial court's award of costs and attorney fees to plaintiffs-appellees, Daniel Knue and Jacqueline Knue ("plaintiffs"), under MCR 2.405, the offer of judgment rule, in the underlying quiet title action. (**Exhibit A** - 12/13/05 Opinion).

In its first published opinion to consider whether MCR 2.405 applies to an equitable quiet title action, the Court of Appeals held that plaintiffs' counsel's alleged "offer of judgment," by which plaintiffs agreed to pay $3,000 in exchange for a transfer of title to the disputed property, was a valid offer under MCR 2.405 simply by virtue of the fact that it included a monetary amount. The Court also held that the "interest of justice" exception does not apply, reasoning that the absence of an adjudication of money damages is not an "unusual circumstance" in a quiet title action, and that the reasonableness of the offer is not a factor that can be considered in the "interest of justice" analysis. As a result, the Court of Appeals has published an opinion that effectively abolishes the American rule against awarding attorney fees to the prevailing party in quiet title actions so long as a party makes any monetary offer in a timely manner, and ultimately prevails.

This result is in direct conflict with another published opinion, *Hessel v Hessel*, 168 Mich App 390; 424 NW2d 59 (1988) which held that MCR 2.405 does not apply to proposed property settlements in domestic relations cases because they are equitable distributions of property, rather than money judgments. If the Court of Appeals had properly addressed and analyzed this

issue and properly applied its *Hessel* opinion to the instant facts, defendants believe it would have concluded that MCR 2.405 does not apply to plaintiffs' quiet title action.

Further, even if the Court of Appeals properly concluded that MCR 2.405 applies to a quiet title action, the Court of Appeals reversibly erred in concluding that plaintiffs' counsel's alleged "offer of judgment" qualified as one under MCR 2.405. This is because plaintiffs' counsel's alleged "offer" carried a condition separate from dismissal for stipulation of a judgment, namely transfer of defendants' ownership interest in the disputed property. An offer of judgment contingent upon a separate condition from dismissal is not an "offer of judgment" under MCR 2.405.

Lastly, the Court of Appeals reversibly erred in concluding that the trial court did not abuse its discretion in failing to invoke the "interest of justice" exception to awarding attorneys fees as sanctions for rejecting an offer of judgment under MCR 2.405(3). This is because this case raises a legal issue of first impression, which the Court of Appeals has held qualifies as an "unusual circumstance" that justifies applying the exception. Alternatively, at the very least, this case raises an unsettled area of law that would result in substantial damages to defendants, which the Court of Appeals has also held to qualify as an "unusual circumstance" that justifies applying the exception.

With this application, defendants ask that this Court peremptorily reverse the Court of Appeals opinion. Failing that, defendants ask that this Court grant leave to appeal to decide the jurisprudentially significant issue of first impression whether MCR 2.405 applies to a quiet title action that seeks a solely equitable remedy – distribution of title to property.

STATEMENT OF THE QUESTIONS PRESENTED

I.

Should this Court review or peremptorily reverse the Court of Appeals opinion that concluded MCR 2.405, the offer of judgment rule, applies to a quiet title action that seeks a solely equitable remedy, distribution of title to property?

Defendants-appellants answer, "yes."

Plaintiffs-appellees answer, "no."

The Court of Appeals would answer, "no."

The trial court would answer, "no."

II.

Should this Court review or peremptorily reverse the Court of Appeals opinion that held plaintiffs' counsel's May 16, 2003 letter qualified as an "offer of judgment" under MCR 2.405(A)(1) where the letter required defendants to agree to a condition separate from dismissal to stipulate to entry of judgment?

Defendants-appellants answer, "yes."

Plaintiffs-appellees answer, "no."

The Court of Appeals would answer, "no."

The trial court would answer, "no."

III.

Should this Court review or peremptorily reverse the Court of Appeals opinion that held the trial court did not abuse its discretion in failing to apply the "interest of justice" exception to awarding plaintiffs attorney fees as sanctions for rejecting an alleged offer of judgment under MCR 2.405(3)?

Defendants-appellants answer, "yes."

Plaintiffs-appellees answer, "no."

The Court of Appeals would answer, "no."

The trial court would answer, "no."

CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Nature of the action.

This is a dispute over sanctions awarded to plaintiffs under MCR 2.405, the offer of judgment rule, after plaintiffs prevailed in their underlying quiet title action against defendants. Defendants appealed the trial court's award of sanctions under MCR 2.405 on three grounds: (1) MCR 2.405 does not apply to quiet title actions seeking solely equitable remedies; (2) even if it did, plaintiffs' counsel's proposed offer of judgment did not qualify as an "offer" under MCR 2.405(A)(1) because it contained conditions separate from dismissal; and (3) the trial court abused its discretion in failing to invoke the "interests of justice" exception to awarding sanctions under MCR 2.405(D)(3).

The Court of Appeals affirmed, rejecting all three of defendants' arguments. Defendants now seek leave to appeal from this Court.

B. Material facts and proceedings.

Plaintiffs reside at 17099 Royal Avenue in Spring Lake, Michigan. (**Exhibit B** – Complaint, ¶ 1 (without exhibits)). Defendant Joan Smith owns the adjacent parcel to the north of plaintiff's property, 17033 Royal Avenue. (*Id.*, ¶ 9).[1] Both of these properties are waterfront properties on Spring Lake. (*Id.*, ¶¶ 6, 10).

In July 2002, plaintiffs brought a quiet title action against defendants, claiming title to real property beyond the recorded property line that divided the adjoining parcels under theories of adverse possession and acquiescence. (*Id.*, ¶¶ 16-20). Plaintiffs also sought a restraining order against defendants to prevent them from entering or altering the disputed property. (*Id.*, ¶¶

[1] Defendants Cornelius Smith and Steve Smith reside with Joan Smith.

21-24). In response, defendants filed counterclaims of trespass and nuisance against plaintiffs. (**Exhibit C** – Defendants' Counter-Claim (without exhibits)).

On May 16, 2003, plaintiffs' counsel, Paul Ledford, sent defendants' trial counsel, John Karafa, a letter that stated:

> Please accept and transmit this offer to your clients for Stipulation of entry of Judgment.
>
> My clients are willing to stipulate to the entry of Judgment in the following manner:
>
> 1. Your clients transfer by Quit Claim Deed the disputed property as described in the survey of Holland Engineering, being approximately 1,032 square feet in a generally triangular plot of land;
>
> 2. In return for the transfer of the property, my clients will pay in cash or cash equivalent the sum of $3,000.00 delivered to you and made payable as you direct;
>
> 3. All claims asserted by both sides dismissed with prejudice and without costs.
>
> Please transmit this offer to your clients, and accept or reject said offer within 21 days as required under MCR 2.405. [**Exhibit D** – May 16, 2003 Letter].

In response, defendants' counsel sent plaintiffs' counsel a letter that provided, in pertinent part:

> This acknowledges receipt of your May 16, 2003 correspondence proposing an offer to Stipulate to the entry of Judgment and citing MCR 2.405. I am assuming you are relying upon your letter as service of the offer. Please be advised, therefore, of Defendant's objections to the proposed offer to Stipulate to the entry of Judgment as phrased in your May 16, 2003 letter since MCR 2.405 is not applicable under the circumstances on claims premised on equitable remedies.
>
> However, your letter is received as a proposed offer to resolve the claims as stated, and I've presented to my clients for consideration. I will get back to you shortly. [**Exhibit E** – May 27, 2003 Letter].

The matter proceeded to a bench trial before the Honorable Calvin L. Bosman of the Ottawa County Circuit Court on November 20, 2003.

C. The trial court's decision.

On March 3, 2004, the trial court issued its factual findings and conclusions of law. (**Exhibit F** – 3/3/04 Findings Of Fact, Conclusions Of Law, And Order Of The Court). The trial court found that plaintiffs had established title to the disputed property through adverse possession and acquiescence and issued a judgment to quiet title. The trial court also awarded plaintiffs their statutory costs, totaling $699.29. (*Id.*).

Plaintiffs then moved for actual costs and attorney fees under MCR 2.405(D)(1). Plaintiffs argued that Mr. Ledford's May 13, 2003 letter to Mr. Kafara was an "offer of judgment" that defendants rejected and, in light of the more favorable verdict they received in the bench trial, plaintiffs were entitled to actual costs under MCR 2.405(D). Defendants responded, arguing that MCR 2.405 was inapplicable to the matter because plaintiffs sought solely equitable remedies. Alternatively, defendants argued that even if MCR 2.405 applied, the May 13, 2004 letter was not an "offer" under the rule because it was conditioned on terms other than dismissal. Also, defendants argued that MCR 2.405(D)(3), the interest of justice exception to awarding attorney fees, applied.

The trial court heard arguments on plaintiffs' motion and took the matter under advisement. (3/22/04 Tr Trans at 21). On April 4, 2004, the trial court issued its opinion and order. (**Exhibit G** – 4/4/04 Opinion and Order). The trial court first found that MCR 2.405 applied to plaintiffs' quiet title action because "the rule itself contains no distinction between cases decided in equity and cases decided at law." (*Id.* at 3, 4, citing *Blessing v Christensen*, unpublished opinion per curiam issued May 21, 2002 (Docket Nos. 227234, 228451 (attached as

Exhibit H)). The trial court next found that *Sandstone Investment Co v City of Romulus*, unpublished Court of Appeals opinion per curiam, issued August 20, 1999 (Docket No. 205476) (also attached as **Exhibit H**), although not binding, was persuasive. The trial court found that the facts and arguments in *Sandstone* paralleled the instant case in that the plaintiff *Sandstone* claimed the defendant's offer of judgment was not an offer under the rule because it addressed the plaintiff's equitable claim for specific performance and monetary damages claim for breach of contract. The *Sandstone* Court concluded that the defendant's offer was valid under the rule because it indicated the defendant's willingness to stipulate to a judgment for $20,000 on both claims. (*Id.* at 4).[2] Because the plaintiffs in this case offered a monetary award of $3,000 to settle the quiet title claim and defendants' counter claims for trespass and nuisance, the trial court concluded that the offer was valid and that the rule applied. (*Id.*).

Next, the trial court found that plaintiffs' counsel's May 13, 2003 letter constituted a offer for a "sum certain" under the rule because it contained an offer for $3,000. (*Id.* at 6). In so doing, the trial court distinguished case law that defendants' had cited, *Hessel, supra*, on the basis that *Hessel* did not involve an offer of a fixed sum of money. (*Id.* at 5). The trial court found that defendants had rejected the "offer" because they did not accept it, as provided under MCR 2.405(C)(1). (*Id.* at 6). Because the trial court found that defendants had rejected the "offer," it had to decide whether the "verdict" was more favorable to plaintiffs than their "offer." The trial court found that the verdict was more favorable than the "offer" because the "offer" was for $3,000 and the verdict awarded plaintiffs' $699.26 in costs as well as title to the property. (*Id.*). As a result, the trial court concluded, plaintiffs were entitled to actual costs under MCR 2.405. (*Id.*).

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[2] *Sandstone, supra* did not, however, deal with an equitable claim for title to property.

Finally, the trial court refused to apply the "interest of justice" exception to awarding costs under the rule. The trial court reasoned that awarding attorney fees under MCR 2.405 is the "rule rather than the exception" absent "unusual circumstances" that defendants did not establish. (*Id.* at 9, citing *Butzer v Camelot Hall Convalescent Centre, Inc (After Remand)*, 201 Mich App 275; 505 NW2d 862 (1993)).

Defendants moved for reconsideration, which the trial court denied. (**Exhibit I** – April 28, 2004 Opinion and Order).

D. The Court of Appeals decision

On December 13, 2005, the Court of Appeals issued its published opinion affirming the trial court's opinion. *Knue v Smith,* __ Mich App __; __ NW2d __ (2005). The Court first interpreted MCR 2.405 as applied to equitable actions. The Court identified what it believed was the problem with applying the rule to equitable claims: "[t]he difficulty with offers involving equitable claims arises in valuing the offer against the verdict to determine whether the offer was more or less than the verdict." Slip op at 2. To fix this problem, the Court speculated, the rule requires than an offer be a written notification for a "sum certain." *Id.*

Applying this interpretation to the facts, the Court held that plaintiffs' offer, even though it included an offer to resolve the equitable quiet title claim, was for a "sum certain." The Court's sole reasoning was because the offer included an offer for $3,000. "Therefore, we conclude that, while there was property involved in this case, the offer was for $3,000, a "sum certain." *Id.* at 3.

The Court did not address how an offer of judgment on a quiet title action can be for a "sum certain" when the offer essentially offers money in exchange for *property* that does not have a value assigned at the time of trial.

Next, the Court of Appeals rejected defendants' argument that the May 13, 2004 letter was not an "offer" because it contained conditions, making it improper under MCR 2.405. The Court held that because the offer in this case did not contain a condition separate from dismissal, it was proper under the rule.

Lastly, the Court of Appeals disagreed with defendants' argument that the trial court abused its discretion in failing to apply the interest of justice exception under MCR 2.405(3). The Court explained that because applying the exception is the "rule rather than the exception," "unusual circumstances" are required. *Id.* at 4, citing *Miller v Meijer, Inc*, 219 Mich App 476, 480; 556 NW2d 890 (1996) and *Luidens v 63rd Dist Court*, 219 Mich App 24, 32; 555 NW2d 709 (1996). The Court concluded that defendants failed to establish unusual circumstances because there was no indication that plaintiffs made the offer for gamesmanship purposes, to avoid case evaluation sanctions, or to tack on fees later. *Id.* at 4. Further, the Court noted, there was no public interest purpose to the litigation. *Id.* The Court dismissed defendants argument that because the law is unsettled in this area that sanctions were not in the "interest of justice," reasoning only that defendants' did not suffer "substantial damages." *Id.* The Court also rejected defendants' argument that the reasonableness of the offer should have been measured and that the reliance on the record property descriptions showed that plaintiffs claim of "lack of bad faith in refusing the offer" was frivolous because they are not factors to invoke the exception. *Id.*

STANDARD FOR GRANTING LEAVE TO APPEAL

The standard for granting leave to appeal is set forth in MCR 7.302. That rule provides the following grounds for granting leave to appeal:

> (1) the issue involves a substantial question as to the validity of a legislative act;
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence;
>
> (4) in an appeal before decision by the Court of Appeals, (a) delay in final adjudication is likely to cause substantial harm, or (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;
>
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or
>
> (6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice.

The issues presented in this appeal merit this Court's review under MCR 7.302(5) because the Court of Appeals' opinion is clearly erroneous, conflicts with other published Court of Appeals opinions, and will cause material injustice, not only in this case but likely in future cases in which lower courts rely on the Court of Appeals' opinion. On this last point, unless this Court intervenes, the Court of Appeals opinion will represent controlling Michigan law that presumably will apply to, and potentially impact, every quiet title action, as well as any number of other equity-based types of actions in Michigan. Indeed, review is also warranted under MCR

7.302(3) because the issue involves a legal principles of major significance to the state's jurisprudence.

STANDARD OF REVIEW IN SUBSTANTIVE APPEAL

This Court reviews de novo interpretation and application of a court rule. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001). This Court also reviews questions of law de novo. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005).

ARGUMENT I

THIS COURT SHOULD REVIEW OR PEREMPTORILY REVERSE THE COURT OF APPEALS OPINION THAT CONCLUDED THAT MCR 2.405, THE OFFER OF JUDGMENT RULE, APPLIES TO A QUIET TITLE ACTION SEEKING SOLELY EQUITABLE REMEDIES

This case requires interpretation of MCR 2.405, the offer of judgment rule.[3] Under the rule, a party may serve a written "offer" to stipulate to entry of judgment on the adverse party

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[3] MCR 2.405 provides:

> (1) "Offer" means a written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued. If a party has made more than one offer, the most recent offer controls for the purposes of this rule.
>
> (2) "Counteroffer" means a written reply to an offer, served within 21 days after service of the offer, in which a party rejects an offer of the adverse party and makes his or her own offer.
>
> (3) "Average offer" means the sum of an offer and a counteroffer, divided by two. If no counteroffer is made, the offer shall be used as the average offer.
>
> (4) "Verdict" includes,
>
> (a) a jury verdict,
> (b) a judgment by the court after a nonjury trial,
> (c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment.
>
> (5) "Adjusted verdict" means the verdict plus interest and costs from the filing of the complaint through the date of the offer.
>
> (6) "Actual costs" means the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment.
>
> (B) Offer. Until 28 days before trial, a party may serve on the adverse party a written offer to stipulate to the entry of a judgment for the whole or part of the claim, including interest and costs then accrued.

(C) Acceptance or Rejection of Offer.

(1) To accept, the adverse party, within 21 days after service of the offer, must serve on the other parties a written notice of agreement to stipulate to the entry of the judgment offered, and file the offer, the notice of acceptance, and proof of service of the notice with the court. The court shall enter a judgment according to the terms of the stipulation.

(2) An offer is rejected if the offeree

(a) expressly rejects it in writing, or
(b) does not accept it as provided by subrule (C)(1).

A rejection does not preclude a later offer by either party.

(3) A counteroffer may be accepted or rejected in the same manner as an offer.

(D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:

(1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.

(2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial.

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule.

(4) Evidence of an offer is admissible only in a proceeding to determine costs.

(5) Proceedings under this rule do not affect a contract or relationship between a party and his or her attorney.

A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment.

(E) Relationship to Case Evaluation. Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.

until 28 days before trial. MCR 2.405(B). The offer must contain an unconditional offer to stipulate to the entry of a judgment in a "sum certain." MCR 2.405(A). The losing party at trial is required to pay the prevailing party's "actual costs" if the rejected offer was more favorable than the eventual verdict. MCR 2.405(A)(1). Here, the Court of Appeals held that MCR 2.405 applies to plaintiffs' quiet title claim, which is not a claim for monetary damages, on the sole basis that plaintiffs offered defendants a specific amount of money in exchange for title to the disputed property. This Court has not yet answered this jurisprudentially significant issue of first impression, namely whether the offer of judgment rule applies to a quiet title action. A proper analysis of the rule and its interpretive, binding case law from our lower courts, as detailed below, reveals that the Court of Appeals erred in concluding that the rule applies to such a claim. Thus, this Court should grant leave or peremptorily reverse the Court of Appeals opinion.

In *Hessel v Hessel*, *supra*, the plaintiff filed her complaint for divorce from the defendant. The defendant submitted an offer to stipulate to entry of judgment, which proposed a property settlement based on the defendant's $284,400 valuation of the parties' marital assets. Specifically, under the offer, the plaintiff would receive certain property that the defendant had valued at $143,200 and the defendant would receive certain property that the defendant had valued at $105,200. The plaintiff rejected. The matter proceeded to trial and the trial court awarded the plaintiff $105,971.39 and the defendant $105,961.38 in assets. The defendant renewed his motion for costs under MCR 2.405.[4] The defendant asserted that because he fared better with the verdict than with his offer, the court was required to award him sanctions under MCR 2.405.

[4] The defendant's first motion for costs under MCR 2.405 was never considered. *Hessel* at 392.

The Court of Appeals noted that the case presented an issue of first impression, whether MCR 2.405 applied to proposed property settlements. *Hessel* at 391. The Court concluded that the rule's language does not evidence the Supreme Court's intent to apply it to a proposed property settlement. In so doing, the Court first explained that the rule's definition of "offer" refers to "the offer of a sum certain." *Id.* at 395. A proposed property settlement does not offer a sum certain, the Court explained, but a division of marital property. *Id.* The property items offered all varied in worth and, thus, the Court concluded, could not be a sum certain. *Id.*

> A proposed property settlement does not offer a sum certain; it offers a division of marital property. This case is illustrative: defendant "offered" plaintiff real estate, a car, household furnishings, and certificates of deposit which would presumably vary in worth depending on when they were withdrawn. In no sense of the phrase can these items be equated with a "sum certain." [*Id.*].

Thus, the Court explained, even if the property's worth was a "sum," its worth was by no means "certain," as the rule requires. *Id.*

Next, the Court concluded that the rule did not apply to a proposed property settlement because there is no "verdict" under the rule. Specifically, the Court held that "a court's property division represents an equitable distribution of the parties' marital assets, not a determination of liability or damages." *Id.* at 395-396. As further support for its conclusion, the Court noted that the rule's definition of "adjusted verdict" contemplates the "automatic imposition of prejudgment interest." Because property distribution in a divorce judgment is not a money judgment within the meaning of the prejudgment interest statute, the Court concluded that it could not qualify as an "adjusted verdict" under the rule. *Id.* at 396.

The *Hessel* Court's reasons for refusing to apply MCR 2.405 to proposed property settlements in a divorce action extend to plaintiffs' quiet title action. A quiet title action, like a proposed property settlement in a divorce action, is an equitable proceeding that asks the court to

distribute title to real property. See, e.g., *Walker v Bowen*, 333 Mich 13, 20; 52 NW2d 574 (1952). By bringing a quiet title action against defendants, plaintiffs, just like the *Hessel* defendant, were not seeking money damages or a liability determination but title to a disputed portion of property. Plaintiffs' alleged offer for stipulation for entry of judgment did not invoke MCR 2.405 because it was seeking to settle a property dispute in their favor. The lower courts' focus on the fact that plaintiffs provided a money amount, $3,000, to dismiss their quiet title and the fact that defendants filed a counter-claim for money damages claim is misplaced. This is because the $3,000 that plaintiffs offered to extinguish all the claims, including the counter claims, did not establish the entire "sum certain" of the offer. Rather, in their attempts to distinguish *Hessel*, the lower courts blatantly ignored the fact that the disputed real property was part of, indeed the essence of, plaintiffs' "offer." Plaintiff was not just offering $3,000 to dismiss the claims but was offering $3,000 in exchange for a dismissal *and a transfer of title* title to the disputed property. As a result, the value of the property would have to be included as part of the offer. Because, as the *Hessel* court explained, the value of property, whether in a divorce property settlement proceeding or in a quiet title action, is by no means "certain" as MCR 2.405 requires.

Further, just as a court's property division represents an equitable distribution of the parties' marital assets, a court's determination of quieting title is not a determination of liability or damages. *Hessel* at 395-396. As the *Hessel* Court explained, MCR 2.405's definition of "adjusted verdict" contemplates the "automatic imposition of prejudgment interest." *Id.* at 396. Because a decision to quiet title in a party's favor is equitable relief, like property distribution in a divorce judgment at issue in *Hessel*, and not a money judgment within the meaning of the prejudgment interest statute, it could not qualify as an "adjusted verdict" under the MCR 2.405.

See *McPeak v McPeak*, 233 Mich App 483, 497; 593 NW2d 180, lv den 461 Mich 926 (1999) ("Having sought and received equitable relief, plaintiffs are not entitled to interest pursuant to the judgment interest statute, MCL § 600.6013; MSA 27A.6013. *Giannetti v Cornillie (On Remand),* 209 Mich App 96, 530 NW 2d 121 (1995).").

The inapplicability of the offer of judgment rule to quiet title actions is easily demonstrated by the fact that the dollar amounts will always be meaningless. The whole point of the offer of judgment rule is to encourage the parties to try to assess the value of the case, i.e., to predict a verdict, then present offers and counter-offers in an attempt to agree on the case's worth and resolve it for that amount. Disputes over title to real property are simply not susceptible to this process because they are not disputes about money. Under the Court of Appeals opinion, so long as a party in a quiet title action offers any monetary amount, regardless of whether it has any correlation to the value of the property, if the offering party prevails and title is quieted in favor of that party, that party will be entitled to attorney fees. In the instant case, there was no assessment as to whether $3,000 represented an appropriate assessment of the value of the real property at issue. Even if plaintiffs had offered $10, as opposed to $3,000, they would have been entitled to their attorney fees under the Court of Appeals' opinion – particularly given the Court's emphasis that the reasonableness of the offer is not a factor to be considered in invoking the "interest of justice" exception. Under the Court of Appeals opinion, so long as a party in a quiet title action makes any monetary offer in exchange for transfer of the title to the property under MCR 2.405, it will be entitled to its attorney fees if it prevails, regardless of whether the monetary amount bears the slightest resemblance to the value of the property or the strength of the offerree's position, and regardless of whether the offer is "reasonable."

For these reasons, the Court of Appeals reversibly erred in concluding that MCR 2.405 applied to plaintiffs' quiet title action and this Court should either peremptorily reverse or grant leave to appeal to consider the issue.

ARGUMENT II

THIS COURT SHOULD REVIEW OR PEREMPTORILY REVERSE THE COURT OF APPEALS OPINION THAT HELD PLAINTIFFS' COUNSEL'S MAY 16, 2003 LETTER QUALIFIED AS AN "OFFER OF JUDGMENT" UNDER MCR 2.405(A)(1) WHERE THE LETTER REQUIRED DEFENDANTS TO AGREE TO A CONDITION SEPARATE FROM DISMISSAL TO STIPULATE TO JUDGMENT

Should this Court conclude that MCR 2.405 applies to a quiet title action seeking solely equitable remedies, the lower courts nonetheless erred in awarding plaintiffs costs under the rule because the May 13, 2004 letter was not an unconditional offer. The rule defines an "offer" as "a written notification . . . of the offeror's willingness to stipulate to the entry of a judgment in a sum certain . . .". MCR 2.405(A)(1). Although the offer need not be in any particular form, it must be "in writing and contain an *unconditional* offer to stipulate to the entry of judgment in a sum certain." *Best Financial Corp v Lake States Ins Co*, 245 Mich App 383; 628 NW2d 76 (2001), quoting 2 Dean & Longhofer, Michigan Court Rules Practice (4th ed), § 2405.2, p 565 (italics in original).

In *Best Financial, supra*, the plaintiff sued the defendant for breach of contract. The parties participated in case evaluation, which resulted in an award for the plaintiff, which the plaintiff accepted and the defendant rejected. The defendant made the plaintiff an unconditional offer to stipulate to the entry of judgment under MCR 2.405 to resolve the matter for $15,000. The plaintiff accepted and moved to enter the judgment. The trial court granted the motion but the defendant appealed. On appeal, the defendant argued that the trial court wrongly granted the plaintiff's motion for entry of judgment because its offer was either withdrawn or modified before the plaintiff accepted. Specifically, the defendant argued that it sent a subsequent letter that met the definition of a new "offer" under MCR 2.405. The letter provided, in relevant part:

> This will confirm our recent telephone conversation regarding the terms and conditions associated with our Offer of Judgment. As we discussed, at the recent Settlement Conference the payment of the $15,000.00 is contingent upon a dismissal of this case with a Confidentiality Agreement and a termination of the relationship between Best Insurance and Lake States. [*Best Financial* at 386-387].

The Court concluded that this letter did not constitute an "offer" under MCR 2.405 because it was conditioned on dismissal with a confidentiality agreement and a termination of the relationship between the plaintiff and the defendant. *Id.* at 387.

> From defendant's perspective, defense counsel's letter at best indicates a willingness to stipulate the entry of a judgment with particular conditions attached and therefore fails to comply with the requirements of MCR 2.405. Because of the insistence on conditions, the offer, if any, was not for a "sum certain" as required under MCR 2.405. [*Id.*].

As a result, the Court held that the letter did not constitute an "offer" under MCR 2.405(A)(1).

Similarly here, plaintiffs' counsel's May 13, 2004 letter to defense counsel did not constitute an "offer" under MCR 2.405 because it contained conditions separate from simply dismissing the claims. The letter expressly conditioned the $3,000 offer not simply on dismissing both plaintiffs' and defendants' claims but on defendants transferring their interests in the disputed property to plaintiffs by quit claim deed. Thus, transfer of ownership interest in the disputed property was a condition of defendants' receiving monetary compensation. As explained in *Best Financial*, this conditional offer cannot qualify as an "offer" under MCR 2.405(A)(1), negating its application to this case.

In the instant case, the Court of Appeals simply ignored the fact that a condition of the plaintiffs' offer was transfer of title to the property, stating only, "As the trial court correctly noted, the offer in this case contained no separate conditions." (Ct App Op, p 4). Respectfully, the Court's refusal even to address the condition of transferring title to the property itself warrants peremptory reversal. Not only was the transfer of title to the property a "condition"

sufficient to render MCR 2.405 inapplicable, it was undoubtedly the main consideration for the offer.

ARGUMENT III

THIS COURT SHOULD REVIEW OR PEREMPTORILY REVERSE THE COURT OF APPEALS OPINION THAT HELD THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO APPLY THE "INTEREST OF JUSTICE" EXCEPTION TO AWARDING ATTORNEYS FEES AS SANCTIONS FOR REJECTING AN OFFER OF JUDGMENT UNDER MCR 2.405(3)

Under MCR 2.405(3), "the court may, in the interest of justice, refuse to award an attorney fee under this rule." The circumstances under which the interest of justice exception is applied must be "unusual." In *Luidens v 63rd Dist Court,* 219 Mich App 24, 35-36; 555 NW2d 709 (1996), lv den 455 Mich 875 (1999), the Court of Appeals identified what qualified as an "unusual circumstance" justifying the exception's application:

> We also believe that a case involving a **legal issue of first impression** or a case involving an issue of public interest **that should be litigated are examples of unusual circumstances in which it might be in the "interest of justice" not to award attorney fees under MCR 2.405**. In his concurring opinion in *Nostrant,* Judge Harrison, at 343, 525 N.W.2d 470, suggested that the exception would apply where the law is unsettled and substantial damages are at issue, where a party is indigent and an issue merits decision by a trier of fact, or where the effect on third persons may be significant. . . .The common thread in these examples is that **there is a public interest in having an issue judicially decided rather than merely settled by the parties. In such cases, this public interest may override MCR 2.405's purpose of encouraging settlement.** These examples involve unusual circumstances under which the "interest of justice" might justify an exception to the general rule that attorney fees are to be awarded. [Emphasis added].

This case presents the jurisprudentially significant issue of first impression whether MCR 2.405 applies to an equitable claim involving property settlements. The only case that implicitly addresses this question is *Blessings v Christensen, supra*, an unpublished, non-binding Court of Appeals decision. In *Blessings,* the plaintiff's claims were for quiet title and slander but the quiet title action had been dismissed through summary disposition before the defendants' offer and the

plaintiffs' counteroffer had been exchanged. Slip op at 5. There, too, the defendants argued that the quiet title claim could not be included in the offer because it was an equitable claim. The Court of Appeals rejected that argument on the sole basis that "there is no distinction between equity and damages in MCR 2.405(D) or MCR 2.405(A)." Slip op at 5. However, besides the fact that the *Blessing* opinion is unpublished and not binding law, for whatever reason, the *Blessing* Court did not address the published *Hessel* holding that provided equitable property settlements are not subject to MCR 2.405.

Defendants in the instant case are directly raising the issue of whether *Hessel* extends to negate MCR 2.405's application to quiet title actions, an issue not dealt with before in a published opinion in the Court of Appeals until now, and never before raised in this Court. Thus, it is a legal issue of first impression that, contrary to the Court of Appeals opinion otherwise, the public has an interest in having judicially decided, rather than settled, which qualifies as an "unusual circumstance" justifying application of the interest of justice exception. *Luidens, supra.*

At the very least, another "unusual circumstance" existed - the law is unsettled in this area and, contrary to the Court of Appeals opinion, "substantial damages" were at issue. *Id.* Defendants are in jeopardy of having to pay tens of thousands of dollars in attorney fees over an issue that plaintiffs' and defendants' trial counsel, other attorneys (i.e., *Blessing*), and the Court of Appeals have conflicting thoughts. Thus, this case raised "unusual circumstances" justifying the trial court's application of the interest of justice exception and the trial court abused its discretion in failing to do so.

The Court of Appeals' discussion of the "interest of justice" exception in its Opinion also demonstrates that that exception will generally be unavailable in the context of quiet title actions-

-which is particularly unfortunate in light of the indisputable fact that any offer of judgment, no matter the amount, will otherwise subject a rejecting party to paying the offeror's attorney fees. As discussed above, even if a plaintiff offers a trivial amount of money in exchange for transfer of title to the offeror, if the party ultimately prevails that offer will entitle it to attorney fees. If this is going to be the law in Michigan, at a minimum the "interest of justice" exception should be meaningfully employed to prevent parties who make unreasonable monetary offers from recovering their attorney fees pursuant to those offers. To the contrary, however, the Court of Appeals specifically noted that the reasonableness of an offer, as well as the fact that the offerree's claim is not frivolous, do not invoke the interest of justice exception. The Court also pointed out that the absence of an adjudication on the issue of money damages is not an "unusual circumstance" in quiet title actions.

In other words, under the Court of Appeals Opinion, even if an offeror makes an unreasonable offer to settle a nonfrivolous quiet title action, rejection of that offer will subject the rejecting party to attorney fees, and the interest of justice exception will be inapplicable. Defendants respectfully submit that, particularly given the fact that this is an area of law that is unsettled, and an issue of first impression, the Court of Appeals treatment of the interest of justice exception should be reversed, or, at a minimum, reviewed by this Court.

RELIEF

For the reasons set forth above, defendants request that this Court either (1) peremptorily reverse the Court of Appeals' December 15, 2005 Opinion; or (2) grant leave to appeal the Court of Appeals opinion and review the issues presented in this application. Defendants further request any and all other relief to which they are entitled.

RESPECTFULLY SUBMITTED,

PLUNKETT & COONEY, P.C.

1/24/06

By: _____

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STATE OF MICHIGAN

IN THE SUPREME COURT

DANIEL KNUE, JACQUELINE KNUE,

Plaintiffs/Appellants, S.C. No._____

v COA No. 255702

CORNELIUS "CASEY" SMITH, JOAN SMITH, and STEVE SMITH L.C. No. 02-43890-CE

Defendants/Appellees.
_____/

AFFIDAVIT OF COUNSEL

STATE OF MICHIGAN)
)ss
COUNTY OF OAKLAND)

Jeffrey C. Gerish, being first duly sworn, deposes and says:

1. That he is an attorney with the firm of Plunkett & Cooney, P.C., and is in principal charge of the above-captioned cause for purposes of preparing the instant application for leave to appeal;

2. That the contents of the attached application are true and accurate to the best of deponent's present information and knowledge.

FURTHER DEPONENT SAITH NAUGHT.

Jeffrey C. Gerish

Subscribed and sworn to before me
this 24th day of January, 2006

Notary Public, Oakland County, MI
My Commission Expires:

ROBIN LARSON
NOTARY PUBLIC OAKLAND CO., MI
MY COMMISSION EXPIRES Feb 7, 2009